

VICKIE SMALLWOOD
Claimant

GOLF ENTERPRISES, INC.
Respondent

TRAVELERS INSURANCE COMPANY
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

[illegible]

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

- (1) What was claimant's average weekly wage on the date of accident?
- (2) Was claimant entitled to temporary total disability compensation and, if so, in what amount?

- (3) Who is responsible for paying both authorized and unauthorized medical for the various treatments provided to claimant after this injury?
- (4) What is the nature and extent of claimant's injury and/or disability?
- (5) Are claimant's prescriptions for psychiatric medication authorized medical treatment?
- (6) Is claimant justified in not returning to work due to her psychiatric condition and ongoing fibromyalgia or is claimant in violation of the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997)?
- (7) Is claimant entitled to future medical treatment and, if so, for what conditions?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant suffered personal injury by accident arising out of and in the course of her employment on August 1, 1993, while filling a tub full of ice. When the tub began to fall, claimant grabbed the tub, experiencing a sudden onset of pain in her upper back and shoulders. Claimant later developed problems in her low back as well. Claimant had a history of low back problems, having undergone a decompression, laminectomy and fusion at L5-S1 in 1977 under the care of Dr. Neonilo Tejano. Claimant did not return to work for eight years after that surgery.

It is acknowledged that claimant was a part-time, seasonal employee in respondent's snack bar and restaurant. During the period between claimant's March 23, 1993, start of employment with respondent and the August 1, 1993, injury, claimant earned \$1,080.06 in wages. Respondent provided its Exhibit 1 to the regular hearing, showing the actual wages paid. Claimant supplemented the record with claimant's Exhibit 1 to the regular hearing, showing she also made \$206.24 in reported tips during this time period. Claimant further testified that she earned an additional \$300 in tips which, while not showing up on claimant's Exhibit 1, were reported to the Internal Revenue Service when claimant filed an amended tax return. This would total \$1,586.30 during the 14-week period before claimant's August 1, 1993, accident.

Respondent contends that claimant should be limited to either the \$1,080.06 or the \$1,286.30 in total wages. Respondent argues the \$300 in previously unreported tips were not originally acknowledged by claimant and were not reported until claimant filed an amended tax return.

Following her injury, claimant sought treatment from numerous physicians, including her personal physician, Dr. Robert Stafford. Claimant had a long history of both physical and psychiatric problems, for which she had received treatment from numerous health care providers. In addition to the back surgery, claimant had also been treated for severe and recurrent depression, as well as numerous gynecological and respiratory problems, irritable bowel, thyroid condition, vision problems, a heart condition, asthma, stomach cramps, hypertension, tremors and high blood pressure. Claimant was seen by numerous doctors prior to the August 1, 1993, accident and, since the accident, has been seen by Dr. Stafford, Dr. Stanley Demski, Dr. William Mallonee, Dr. Weidensaul, Dr. Thomas Kneidel, Dr. Tejano, Dr. C. Reiff Brown, Dr. Robert Eyster, Dr. Philip Mills, Dr. George Fluter at the pain clinic, Dr. Marvin Parrish, a psychologist, Dr. Mark Goodman, another psychologist, Dr. Frederick Wolfe and Dr. Bruce Klosterhoff, a psychiatrist. Claimant has been diagnosed and is currently being treated for dysthymia, a chronic ongoing depression disorder, and somatization disorder or Briquet's syndrome, a condition where an individual displays multiple physical complaints, stress related. Claimant has also been diagnosed with fibromyalgia.

Although numerous medical records are contained in the record, only two health care providers, Dr. C. Reiff Brown and D. Bruce Klosterhoff, testified in this matter. Claimant was examined by Dr. Brown, an orthopedic surgeon, on April 17, 1996. Dr. Brown agreed that fibromyalgia is a developmental problem which can be precipitated by injury, although it is not uncommon to occur without injury, simply during the course of daily activities. He did testify that, in his opinion, the claimant's fibromyalgia is related to the August 1, 1993, episode of grabbing the ice bucket. This is, in part, based upon his examination of claimant and, in part, based upon the history provided by claimant that she didn't have any of the components of fibromyalgia before the ice bucket incident.

Dr. Brown assessed claimant a 9 percent impairment based upon limitations of motion of her cervical spine and an 18 percent impairment for the range of motion limitations to the claimant's lumbar spine. These combine to a 26 percent whole body impairment. Claimant also had an 8 percent impairment of the body based upon her previous lumbar spine surgery. This totals to a 32 percent whole body functional impairment after this injury.

Claimant was also examined and treated by Dr. Bruce Klosterhoff, a psychiatrist and medical director at Horizons Mental Health Center. He first saw claimant in October 1994 and has been seeing her on a somewhat regular basis since that time. He diagnosed claimant with both dysthymia and somatization disorder. He acknowledged that claimant had a history of chronic depression and opined that the somatization disorder very likely

preexisted the August 1993 accident. He stated the August 1993 injury aggravated both the dysthymia and the somatization disorder. Dr. Klosterhoff, in reviewing claimant's medical history, in particular that from Dr. N. E. Roach, expressed shock at the level of antidepressants being administered to claimant. He described them as being the biggest doses of antidepressants he had ever seen used. In responding to what restrictions he would place on claimant, Dr. Klosterhoff opined that he did not believe claimant was employable at the time of his deposition in January 1998, primarily because of claimant's psychiatric problems.

A portion of the medical records contained in the record include those from Dr. Philip Mills, a board certified physical medicine specialist, Dr. Brown, Dr. Robert Eyster, a board certified orthopedic surgeon, Dr. Kneidel, Dr. Mark Goodman, a psychologist, Dr. Marvin Parrish, a clinical psychologist, Dr. Klosterhoff and the Horizons Mental Health Center medical reports, medical treatment notes and records from the Hutchinson Clinic and the Hutchinson Hospital, Hertzler Clinic and Hertzler laboratory medical records, and medical records from Dr. Frederick Wolfe, clinical professor of Internal Medicine at the University of Kansas School of Medicine.

Dr. Wolfe, an expert in the examination and treatment of fibromyalgia, opined that fibromyalgia has many potential causes. It may be exacerbated or even caused by psychological as well as physical factors. Dr. Wolfe has treated almost 2,000 patients with fibromyalgia and rheumatic diseases and, in his medical opinion based upon his experience, felt that claimant was in fact totally work disabled. He did go on to state that claimant's work disability was primarily based upon the psychiatric conditions. He found that claimant's panic disorder, bouts of depression, uncontrolled anxiety and certain personality problems are the factors which lead to claimant's disability. He went on to say that claimant is unemployable because of these psychiatric issues. He did, however, state that, while claimant has a severe disability combined with medical and psychiatric problems, it is impossible for him to say whether or not the employment accident caused this disorder. He did recommend that claimant take less medication, which he felt would improve claimant's condition.

As of the time of claimant's testimony at regular hearing in December 1997, claimant had not sought any type of employment since the August 1, 1993, accident.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish his or her right to an award of compensation by proving the various conditions upon which his or her right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

The Appeals Board will first consider claimant's average weekly wage on the date of accident. The evidence provided by both claimant and respondent shows claimant's

potential average weekly wage to range from \$77.15 per week, based upon respondent's \$1,080.06 actual payments, to \$113.31 per week, if one includes all of the tips reported both on claimant's W-2 and claimant's amended tax return. The Appeals Board finds the testimony of claimant to be the most persuasive regarding what she earned. The Appeals Board affirms the finding by the Administrative Law Judge that claimant had an average weekly wage of \$113.31 and a weekly benefit rate of \$75.54. Therefore, the finding that claimant has been underpaid temporary total disability compensation benefits in the amount of \$736.28 for the 76.14 weeks of temporary total disability compensation is also affirmed.

The Administrative Law Judge, after reviewing the medical testimony, found that claimant's depression and somatization disorder were aggravated by the August 1, 1993, injury. Therefore, all psychiatric and counseling expenses incurred by claimant were ordered as authorized medical treatment. Similarly, any prescriptions incurred for claimant's psychiatric conditions were ordered paid as authorized medical treatment. The Appeals Board, in reviewing the evidence, adopts that conclusion as its own. The Administrative Law Judge, however, went on to find that claimant's complaints of irritable bowel, thyroid condition, vision problems, gynecological and respiratory problems, eye complaints, heart condition and asthma are unrelated to claimant's injury of August 1, 1993, or her work with respondent. Any medical, authorized or unauthorized, for these conditions would not be the responsibility of respondent or the Workers Compensation Fund. The Administrative Law Judge went on to require respondent and its insurance carrier to repay claimant and her husband for any medical expenses incurred and paid through another insurance company. This order is affirmed insofar as it applies to the conditions which the Administrative Law Judge found to be work related, but not the conditions found to be unrelated to claimant's accident of August 1, 1993.

The Appeals Board, likewise, finds claimant entitled to future medical benefits for the conditions found to be work related, but future medical is denied for those conditions not related to claimant's August 1, 1993, accident.

With regard to the nature and extent of injury, the parties have stipulated claimant has a 13.5 percent permanent impairment of function to the body as a whole and an 18 percent loss of task performing ability under K.S.A. 44-510e. The issue remaining is what wage loss claimant may have suffered as a result of the injuries on August 1, 1993, and further whether claimant is able to return to work in any type of substantial and gainful employment, or whether claimant's physical and psychiatric conditions prohibit her from returning to the work force.

The medical and psychiatric opinions of Dr. Klosterhoff and Dr. Brown support a finding that claimant's psychiatric conditions, although preexisting this accident, were aggravated by the August 1, 1993, accident. A traumatic neurosis, even preexisting, if aggravated by a subsequent industrial accident, is compensable under the Workers Compensation Act if it results from a physical injury and meets the other requirements of

the Workers Compensation Act. See Boutwell v. Domino's Pizza, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* ___ Kan. ___ (1998). The medical evidence supports a finding that claimant's psychiatric condition was aggravated by the August 1, 1993, incident. The Administrative Law Judge, when asked to consider the logic of Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), found that claimant's failure to seek replacement employment was not due to bad faith on claimant's part but, instead, was the direct result of the injury suffered by claimant and the aggravation of her psychiatric conditions. He went on to find that claimant was justified by her psychiatric condition and diagnosis of fibromyalgia in believing that she was unable to return to work. He, therefore, found claimant entitled to an award of work disability. The Appeals Board agrees that the medical opinions of Dr. Klosterhoff and Dr. Brown support a finding that claimant's preexisting psychiatric conditions and the current diagnosis of fibromyalgia would prohibit claimant from returning to work.

The Administrative Law Judge combined claimant's 100 percent wage loss with her 18 percent stipulated task loss in reaching an award of 59 percent. The Appeals Board acknowledges that the parties stipulated claimant had an 18 percent loss of task performing abilities as a result of this injury. However, the loss of task performing abilities relates to claimant's physical limitations, but does not appear to take into consideration the psychiatric limitations experienced by claimant after this injury. Dr. Klosterhoff, who has been treating claimant since 1994, opined claimant is not employable at this time because of claimant's psychiatric problems. As the psychiatric problems either stem from or were aggravated by the accidental injury, they are compensable and must be taken into consideration when awarding claimant a work disability. In addition to the stipulated task loss of 18 percent, the Appeals Board finds, based upon Dr. Klosterhoff's testimony, that claimant is permanently and totally disabled from any type of employment. Therefore, the Award of the Administrative Law Judge granting claimant a 59 percent permanent partial disability should be modified to grant claimant an award of permanent total disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated July 30, 1998, should be, and is hereby, affirmed with regard to the findings associated with claimant's average weekly wage, the amount of temporary total disability compensation due and owing, claimant's authorized and unauthorized medical, claimant's prescriptions for psychiatric care, and claimant's entitlement to future medical treatment. The Award of the Administrative Law Judge is modified with regard to the nature and extent of claimant's injury and disability, and the claimant, Vickie Smallwood, is granted an award against the respondent, Golf Enterprises, Inc., and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund, for an award of permanent total disability resulting from the August 1, 1993, accident. Claimant is entitled to 76.14 weeks of temporary total disability compensation at the rate of \$75.54 per week in the amount of \$5,751.62, followed by

compensation at the rate of 75.54 per week for a total award of \$125,000.00, until fully paid or until further order of the Director.

As of August 1, 1999, there would be due and owing to claimant 76.14 weeks temporary total compensation at the rate of \$75.54 per week in the amount of \$5,751.62, plus 236.86 weeks permanent total compensation at the rate of \$75.54 per week in the amount of \$17,892.40, for a total due and owing of \$23,644.02, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$101,355.98 shall be paid at the rate of \$75.54 per week for a total award of \$125,000.00 or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Juhnke, Hutchinson, KS
E. Thomas Pyle, III, Hutchinson, KS
David G. Shriver, McPherson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director